Filed 1/11/10 P. v. Jones CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BRET ALLEN JONES, Defendant and Appellant.	2d Crim. No. B215885 (Super. Ct. Nos. 1141933, 1238454) (Santa Barbara County)

Bret Allen Jones appeals the judgment entered after he (1) was found in violation of his probation following his conviction for false personation (Pen. Code,[1] § 529) and driving with a suspended license for driving under the influence (Veh. Code, § 14601.2, subd. (a)) (case no. 1141933); and (2) pleaded no contest to grand theft (§ 484g), identity theft (§ 530.5, subd. (a)), six counts of commercial burglary (§ 459), and five counts of forgery (§ 470, subd. (a)) (case no. 1238454). The trial court sentenced him to a total state prison term of seven years eight months. He contends the court violated the terms of his plea agreement in that he agreed to plead to the new charges in exchange for a sentence of five years eight months. Because appellant's claim is essentially an attack on the validity of his plea and he did not obtain a certificate of probable cause, we dismiss the appeal.

---

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY

On September 27, 2003, appellant was stopped at a driver's license checkpoint in Santa Barbara.[2] After he presented himself as Gregory Ryan Jones and claimed he had left his license at home, he was cited and released. Someone identifying himself as Gregory Jones subsequently appeared in court and pleaded no contest to charges of driving with a suspended license and without proof of financial responsibility. A warrant was issued in the name of Gregory Jones for nonpayment of the fines. After appellant's true identity was discovered, he pleaded guilty to false personation and driving with a suspended license for driving under the influence. He was granted three years formal probation with terms and conditions.

On November 1, 2006, appellant used another person's credit card to purchase $82.68 worth of merchandise at a department store. From February through April of 2007, he used the stolen identities of two men to cash several stolen checks. He also made several purchases on a credit card that belonged to one of the men whose identity he had stolen. On February 19, 2007, he broke into a nightclub and stole a safe containing blank business checks. A week later, he forged and deposited one of the stolen checks in the amount of $375.

Appellant was arrested on October 29, 2007. On January 28, 2009, he was charged with grand theft, identity theft, six counts of commercial burglary, and five counts of forgery. In the meantime, his probation had been revoked in the prior case after the court found him in violation of his probation.

On February 4, appellant pleaded no contest to all charges in the new case. On the plea form, appellant initialed the box corresponding to the handwritten notation "Defendant pleads open to the Court." He also initialed the box to reflect his understanding that as a result of his plea he could receive a sentence of up to seven years eight months in state prison. Appellant similarly expressed his understanding during the

---

[2] Because appellant pleaded guilty in both cases prior to trial, the relevant facts are derived from the probation officer's reports.

plea colloquy that his plea was "going to be an open plea to the Court" and that he "could receive up to seven years, eight months in state prison."

At the sentencing hearing, appellant's attorney urged the court to grant probation and place him in a drug treatment program. In arguing for the maximum sentence, the prosecutor recalled that prior to appellant's plea there had been a chambers discussion in which "[t]he Court gave an indication at that time that you would consider a five-year-eight-month sentence." The prosecutor asserted that "if the Court does decide to stick with . . . the five years, eight months that we had originally discussed way back in September, I would encourage the Court to ask the defendant to waive his credits." The court proceeded to sentence appellant to a total term of seven years eight months.

When the matter was recalled later that afternoon, appellant's attorney stated that "when you gave an indicated sentence, it was five years, eight months, and in between that date and this date, nothing has changed." The court responded, "I don't recall indicating the sentence. In what language? What did I say?" Appellant's attorney replied, "I'll give him five years, eight months if he pleads. He pled." The prosecutor explained that "on the day we had the discussion in chambers [September 15], I was asking for seven years, eight months. You said if he pleads today, I'll give him five years, eight months. He chose not to plead and he chose to proceed to trial." Appellant's counsel challenged that characterization and asserted that "[t]he offer was open ended."

After further discussion, the court stated, "Well, you know my practice, which is set out in the protocol. Once a matter is set for trial, all settlement discussions are off the table, and there's either a trial, plea to the charges, or dismissal." When appellant's attorney noted that appellant "pled to the charges," the prosecutor responded, "[w]hich is why, when I took the plea, I explained all that to the defendant, what his maximum exposure was, so he was aware that he could get seven years, eight months. That's my understanding of the Court's policy." The court agreed with the prosecutor's assessment.

Appellant filed a timely notice of appeal from the judgment along with a request for a certificate of probable cause. The record does not reflect whether the court ever ruled on the request.

DISCUSSION

Appellant contends his sentence should be reduced to five years eight months pursuant to the terms of his plea agreement. The People respond that this claim is not cognizable because it essentially challenges the validity of his plea and he did not obtain a certificate of probable cause. In his reply brief, appellant asserts that no certificate of probable cause is required because he merely asks us to "address errors in sentencing committed after entry of Appellant's guilty [*sic*] plea." Appellant is mistaken.

A certificate of probable cause is a prerequisite to an appeal from a judgment on a plea of guilty or nolo contendere unless the appeal is based solely on grounds occurring after entry of the plea that do not challenge its validity. (Cal. Rules of Court, rule 8.304(b)(1); § 1237.5.) In determining whether a certificate of probable cause is required to challenge a sentence imposed following a plea, we consider the substance of the claim rather than the timing of the events. (*People v. Buttram* (2003) 30 Cal.4th 773, 781-782.) "[E]ven if it purportedly challenges the sentence only, a defendant's appeal from a judgment of conviction entered on a plea of guilty or nolo contendere must be dismissed in the absence of a statement of grounds by the defendant and a certificate of probable cause by the trial court if, *in substance,* it challenges the validity of the plea. [Citation.] It does so if the sentence was part of a plea bargain. [Citation.] It does not if it was not [citation] . . . ." (*People v. Lloyd* (1998) 17 Cal.4th 658, 665.)

Notwithstanding appellant's attempt to characterize his claim as something other than an attack on his plea, that is exactly what it is. He essentially contends that his agreement to enter an open plea, as reflected in the plea form and colloquy, was not knowing, voluntary and intelligent. Moreover, this is not a case in which it would be appropriate to specifically enforce a plea agreement on direct appeal because the record reflects that the agreement was not violated. (Compare, e.g., *People v. Mancheno* (1982) 32 Cal.3d 855, 860.) After the court made clear at sentencing that its prior offer to

sentence appellant to a lesser term was not part of the plea agreement, his remedy was to seek to set aside his plea in accordance with section 1192.5. His failure to obtain a certificate of probable cause is therefore fatal to the appeal.

The appeal is dismissed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Frank J. Ochoa, Judge

Superior Court County of Santa Barbara

Allen Bifano for Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Joseph P. Lee, Deputy Attorney General, for Respondent.